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In the Supreme Court of the United States

OCTOBER TERM, 1914.

LIEUTENANT COLONEL DANIEL C. STERNE,
Complainant and Appellant,

v.

BRIGADIER GENERAL GEORGE H. WOOD,
Respondent and Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF RESPONDENT

HUBERT J. TURNEY,
NATHAN WILLIAM MACCHESNEY,
DON R. SIPE,
Attorneys for Respondent and Appellee.

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BRIEF OF RESPONDENT.

INTRODUCTORY.

The statement of facts contained in the brief of counsel for appellant, fairly states the facts of this case and outlines the questions of law sought to be determined.

ARGUMENT.

This action is brought for the purpose of establishing questions of the highest importance, not only to one hundred and thirty thousand officers and men of the organized militia who are now serving, but of the highest importance to the states and the commonwealth. It is vitally necessary that in time of peace the military organizations should be perfected for its service in time of war; and

that there should not be the slightest doubt with respect to the rights of its members on one hand and the power of its military commanders and its Commander-in-Chief on the other.

It first becomes appropriate to consider the meaning of this provision of the Constitution which reserves to the States the appointment of the officers. This provision is historical in its nature. At the time of the contest between King Charles and the Long Parliament, the Parliament becoming jealous of the control of the King over the armies of England, passed an Act providing that for the time being the officers of the militia should be appointed by Parliament. It is not necessary to follow the historical parliamentary discussion at that time or the military activities which followed, except to observe that the theory under which the Act was passed was that control of the military forces could never be entirely separated from the power which appointed the officers commanding.

Over one hundred years later, the constitutional provision which is now under discussion was adopted, but by men who had become opposed in like manner to the King of England as was the Long Parliament, and the provision referred to was written into the Constitution upon exactly the same theory.

A careful reading and analysis of the debates in the Constitutional Convention show that a fear

was present in the minds of some persons that the federal government would use its military power to crush the individual states and to take away their liberties.

We refer the court to the 28th and 29th Articles of the "Federalist" and to the following quotation therefrom:

> "By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government. It is observed that select corps may be formed, composed of the young and ardent, who may be rendered subservient to the views of arbitrary power. What plan for the regulation of the militia may be pursued by the national government, is impossible to be foreseen."
>
> * * *
>
> "There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instill prejudices at any price; or so the serious offspring of political fanaticism. Where, in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their com-

trymen, and who participate with them in the same feelings, sentiments, habits, and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary, while the particular States are to have the *sole and exclusive appointment of the officers?* If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the State ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a prepondering influence over the militia."

* * *

"If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

We should recollect that the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come, it will not be possible to maintain a large army; and as the means of doing this increase, the population and natural strength of the community will

> proportionably increase. When will the time arrive that the federal overnment can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity, and system of independent nation?"

We need to but refer to debates in the Convention and articles written at that time to find that in the discussion of this question of the reservation of the right to the states for the appointment of the officers of the militia was greatly influenced by arguments that in the event there should be a domestic disorder in Pennsylvania requiring the use of its militia, or if the federal government had use for the militia of a lare part of the states in the southern portion of the Confederacy, that New York State would be liable to march its military forces into Vermont and by force of arms regain its jurisdiction over that commonwealth which originally was contained within its borders.

We of the present hour can of assurity look upon these arguments and fears with a lively sense of amusement. The splendid and efficient military establishment of our Empire State has not invaded the sovereign commonwealth of Vermont upon hostile purpose bent. She has not even endeavored, except through the course of law, to obtain posses-

sion of a wayward citizen of Pennsylvania temporarily sojourned within the borders of that State.

It may be said that the fact that the purposes for which the provision was adopted having proven unnecessary, and its being adopted upon a false premise or expection, in no way interferes with the efficaciousness of the Constitutional provision; and this we concede. The historical reference is but to invite attention of the court to the fact that in the intention of the founders of the Constiution, it was the intent to vest the power to do all things necessary for the military arm of the government where it should naturally repose; and that the reservation to the states of the appointment of the officers are but for the purpose of protecting the states against a military invasion by the federal power.

The maintenance of armies is a function of the nation in the exercise of its sovereign rights and is not a function of the state or any lesser political subdivision. The duty to maintain its sovereignty by force of arms to declare war and to conclude peace is one directly incumbent upon the nation alone.

Mulford, The Nation, Page 160.

The nation is a population of an ethnic unity, inhabiting a territory of a geographical unity.

Burgess Political Science and Constitutional Law, Volume 1, Page 1.

The word is derived from the Latin "Nascore"

(to be born) and directly implies race kinship with its incident feature of defense and protection of itself against a foreign enemy.

"The State is a political subdivision of the nation for administrative purposes" Bluntchli.

National defense is a national function and not a function of the State. The primary purpose of the creation of armies is a public defense. That they are useful in time of domestic calamity and are used in such instances is but an incidental result of their training, preparedness and availability.

We contend that the law with respect to the powers of congress in regard to the militia is correctly announced by Justice Washington in the case of Houston vs. B. S. Moore, 5th Wheaton, 16 when he said:

"This power to organize being limited except in the two particulars of officering and training them according to the discipline prescribed by congress, it may be exercised to any extent that may be necessary by congress."

Again in the same case, in the independent opinion filed by Justice Johnson, we find the following: "The power of congress over the militia is limited but by two reservations in favor of the states, namely, the right of officering them and that of training them."

We also refer to In re Spangler, 11 Mich., 298, where Chief Justice Martin, referring to the pro-

vision of the citation authorizing congress to provide for organizing, arming and disciplining the militia, says: "This whole power was conferred upon congress, reserving only to the states the appointment of the officers and the training of the militia according to the discipline prescribed by congress." Page 305.

We therefore contend that clearly, instead of all powers except those which may be construed within the terms of organization, government and discipline being vested in the States by the tenth amendment, all powers are vested in Congress with respect to the militia except the specific reservations to the states. We contend that the power vested in the states of the appointment of the officers extends only to the naming of the man who shall hold the specific commission.

That is all that was originally intended when, strange as it may seem, there was a fear that congress and the federal power would oppress the states through its control of the army and therefore there was reserved to the states themselves the appointment of the officers. This meant nothing except the selection of the individual; and this provision inserted against a danger which then was and now is non existent, should be given no greater scope than is contained within itself. If, then, we have fairly established that the fixing of the rank and grade of officers by congress came within its powers of organizing, arming and disciplining, and

of other powers not mentioned, except the appointment of the officers, and not under this latter provision, we will then pass to the question of whether or not the action of congress in prescribing that the organization of the militia should be the same as that of the regular army, with such exception as the Secretary of War might from time to time prescribe, and the action of the Secretary of War thereunder requiring it to wholly conform and in the promulgation of the requirement prescribing the units and subdivisions which must exist in larger units, comes within the powers before referred to as having been conferred upon Congress, or whether the same is within the second power reserved to the states, that is to say, the training of the militia according to the discipline prescribed by congress:

Circular No. 8 was issued under date of August 1, 1913, by order of the Secretary of War, and specifies the organization to which the Secretary of War deems it essential that the organized militia of the various states shall conform.

The authority for War Department Circular No. 8 must rise in that part of Section 8, Article 1, of the Constitution of the United States which provides that

"The Congress shall have power * * * to provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United

States, reserving to the States, respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by the congress: * * *,

and in the following statutes:

"In the ordinary arrangement of the Army two regiments of infantry or of cavalry shall constitute a brigade, and shall be the command of a brigadier general, and two brigades shall constitute a division and shall be the command of a major general; but it shall be in the discretion of the commanding general to vary this disposition whenever he may deem it proper to do so." (Sec. 1114 Revised Statutes.)

"That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the Regular or Volunteer Army or to the militia, shall be organized, as far as practicable, into divisions of three brigades, each brigade to be composed of three or more regiments; and whenever three or more divisions are assembled in the same Army the President is authorized to organize them into army corps, each corps to consist of not more than three divisions." (Sec. 9, Act of April 22, 1898, 30 Stat. *362).

"* * * On and after January 21, 1910, the organization, armament, and discipline of the organized militia in the several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States,

subject in time of peace to such general exceptions as may be authorized by the Secretary of War; * * *" (Sec. 3 act of January 21, 1913, as amended by Sec. 2, Act of May 27, 1908, 35 Stat. 400.)

The legislative forerunner of Section 1114 is Section 8 of the Act of March 3, 1799, reading as follows (1 Stat, 752.)

"That in the orginary arrangement of the army, two regiments of infantry or cavalry shall constitute a brigade, and shall be commanded by a brigadier general; two brigades, a division, and shall be commanded by a major general. *Provided always*, That it shall be in the discretion of the commanding general to vary this disposition whenever he shall judge it to be proper. * * *"

Section 9 of the same Act provided

"That a commander of the Army of the United States shall be appointed and commissioned by the style of 'General of the Armies of the United States,' * * *"

Both Section 8 of the Act of March 3, 1799, and Section 1114 of the Revised Statutes lay down a rule in respect of the "ordinary arrangement of the Army." The only Army officer who could properly have or be granted authority to vary the arrangement of the contsituent organizations of the Army as a whole would naturally be the officer having authority over the whole of the Army, namely, the commanding general of the Army.

Since August 15, 1903, when the Act of February 14th, 1903 (32 Stat. 830) establishing the General Staff Corps and providing for a Chief of Staff, became effective, no general officer has been assigned to duty as commanding general of the Army and all orders issued for the government of the Army at large have been issued by authority of the Secretary of War. Being in respect of military affairs, the representative of the President, the constitutional commander-in-chief of the Army, it was within the power of the Secretary of War, even while there was a commanding general of the Army, to control the military acts of such commanding general, so that the discretion vested in that officer by Section 1114, Revised Statutes, was subject to the control of the Secretary of War. There being at present no commanding general of the Army, the authority at one time exercised over the Army at large by such commanding general, including the authority conferred by Section 1114, Revised Statutes, is properly and legally to be exercised by the Secretary of War.

The Secretary of War then has authority to prescribe the organization of the Army into brigades and divisions by varying what is described in Section 1114, Revised Statutes, as the "ordinary arrangement of the Army" into brigades each consisting of two regiments of infantry or cavalry, and into divisions each consisting of two brigades. To take a regiment from a brigade consisting of two

regiments would destroy the brigade organization, leaving a regiment and nothing more. Likewise to take a brigade away from a division consisting of only two brigades would destroy the division organization, leaving a brigade and nothing more. The authority to vary the brigade and division organization be exercised by adding one or more additional regiments or a force of auxiliary troops, or both, to the minimum components of a brigade.

In Section 9 of the Act of April 22, 1898 (30 Stat. 362), enacted at the out-break of the Spanish War, it is provided:

"That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the Regular or Volunteer army or to the militia, shall be organized, as far as practicable, into divisions of three brigades, each brigade to be composed of three or more regiments; and whenever three or more divisions are assembled in the same army, the President is authorized to organize them into army corps, each corps to consist of not more than three divisions;" while section 11 of the same Act (30 Stat. 363), provides,

"That the President is hereby authorized to appoint in the Volunteer Army, by and with the advice and consent of the Senate, not exceeding one major general for each organized army corps and division, and one brigadier general for such brigade. * * * thus authorizing, if not re-

quiring, a war organization into brigades consisting of three or more regiments, divisions consisting of three brigades, and corps consisting of two or three divisions, and limiting the number of general officers to a number equal to the number of brigades, divisions and corps thus formed. The infantry component of the Army as authorized by the Act of March 2, 1899 (30 Stat. 977, 980), for service during the Philippine insurrection, consisted of 52 regiments, regular and volunteer, and the cavalry component of 13 regiments, regular and volunteer — sufficient to constitute 32 brigades and 16 divisions of the minimum strength authorized by Section 1114, Revised Statutes, and required for their command 32 brigadier generals and 16 major generals. But the Act made provision (30 Stat. 980), for no more than 25 brigadier generals and 8 major generals, regular and volunteer — a number of general officers approximately sufficient to furnish commanding officers for brigades composed of three regiments, divisions composed of three brigades with a complement of auxiliary troops, and army corps composed of two or three divisions.

Neither of the two statutes now in force in respect of the organization of brigades and divisions (Sec. 1114, Revised Statutes, and Sec. 9, Act of April 22, 1898) prescribe a fixed organization. An effect of the earlier statute is to fix the minimum strength of brigades and divisions respectively, and

an effect of the later statute is to require that under certain stated conditions the strength of brigades and divisions respectively shall equal another minimum. Neither statute precludes the proper military authority from prescribing a brigade and division organization of greater strength. As the statutes do not definitely fix the constitution of brigades and divisions, it follows that the organization of bridages and divisions may be *prescribed* by the proper military authority, — in this case the Secretary of War, who may prescribe such organizations subject only to the statutory provision that at no time shall a brigade consist of less than two regiments nor a division of less than two brigades (Sec. 1114 R. S.) and the further statutory provision that in time of war or when war is imminent all troops in the service of the United States shall be organized, so far as practicable, into divisions of three brigades, each brigade to be composed of three or more regiments (Sec. 9, Act of April 22, 1898.) The statute last mentioned is the latest expression of the legislative will upon the subject and as it becomes operative in time of war or when war is imminent, it is imminently proper that the Secretary of War should exercise the discretionary power conferred upon him in Section 1114, Revised Statutes, by prescribing that the peace organization of brigades and divisions shall conform to the organization that would be required in time of war. In the ex-

ercise of the power vested in him the Secretary of War has *prescribed* (Field Service Regulations May 21, 1913) an appropriate tactical unit to which circular No. 8 conforms.

The brigade and division organization of the Regular Army having been lawfully prescribed as set forth in paragraphs 5, 6, and 7 of the Field Service Regulations of 1913, it follows that if full force and effect is to be given to that portion of Section 3 of the Act of January 21, 1903, as amended by Section 2 of the Act of May 27, 1908, which provides that

"On and after January 21, 1910, the organization, armament and discipline of the Organized Militia * * * shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

brigade and division organization in the Organized Militia must conform to that prescribed in the Field Service Regulations, except in so far as the Secretary of War may see fit to authorize exceptions to the scheme of organization therein prescribed. It may be noted here that the brigade and division organization prescribed in paragraphs 5, 6, and 7 of the Field Service Regulation of 1913 be identical with that prescribed in the corresponding paragraphs of the Field Service Regula-

tions of February 21, 1910. It is true that in the regulations for the Organized Militia promulgated under date of March 12, 1910, it was provided that

"228. A brigade will ordinarily consist of two or more regiments of infantry, three being the normal organization, but separate battalions and separate companies may be assigned thereto; * * * *

and

"227. Where two or more brigades are organized, such brigades and the other units of the Organized Militia may be constituted a division. * * * *"

but those regulations, issued, as they were, shortly after the present brigade and division organization had been prescribed for the Regular Army, were evidently promulgated by the Secretary of War in the exercise of the power conferred upon him by Section 3 of the Act of January 21, 1903, as amended, to make general exceptions in time of peace to the statutory rule that the organization of the Organized Militia shall conform to that prescribed for the Regular Army. In Circular 8, Division of Militia Affairs, War Department, 1913, the Secretary of War has simply withdrawn the authority for the exceptional brigade and division organizations permitted by the Militia Regulations of 1910. The result is that under the *statute* militia brigade and division organization must conform to the *prescribed* for like units of

the Regular Army, subject only to any old exceptions that may have been preserved or new exceptions that may have been authorized in Circular 8.

In Section 8 of Article I of the Constitution of the United States, it is provided that:

"The Congress shall have the power * * * to provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress * * * "

and in the exercise of the power thus conferred the Congress has, in Section 3 of the Act of January 21, 1903, as amended, prescribed that:

"* * * the organization * * * of the organized militia * * * shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. * * * * "

In providing for the permanent military establishment of the United States, the Congress has seen fit to prescribe with great particularity the organization of companies, troops, batteries, battalions, squadrons and regiments, leaving little to executive discretion beyond the power to fix the enlisted strength of companies, troops and bat-

teries, at any point between minimum and maximum limits established by statute. It is understood that no question is raised as to the binding force of the Federal rule fixing the organization of companies, troops, batteries, battalions, squadrons and regiments.

Inasmuch as, under the Constitution, Congress has plenary power to provide for organizing the militia, there can be no question but that Congressional legislation prescribing the organization of the militia is the supreme law of the land upon that subject, and that State legislation in conflict with Congressional legislation upon this subject must yield to the extent that the two are in conflict. Houston vs. Moore, 5 Wheat. 16, 45, 49, 50: Dun vs. The People, 94 Ill., 120, 124, 134. In respect of inferior units, Congress has itself laid down a quite definite and almost fixed rule, but in respect of brigades and divisions much has been left to executive discretion; that is, as has heretofore been shown, the Congress, in effect, has invested the Secretary of War with power to *prescribe* the brigade and division organization of the Regular Army, subject only to the statutory requirement that such organization shall consist of a stated minimum number of subordinate organizations. This power the Secretary of War has exercised in paragraphs 5, 6, and 7 of the Field Service Regulations. The organization thus prescribed is prescribed under authority of Congress

and through Congress under authority of the Constitution to the same extent, and has the same legal force and effect, as if the Congress itself had laid down in terms the rule of organization expressed in the Field Service Regulations. It follows that not only must State legislation prescribing a militia organization different from that prescribed by Congress itself yield and stand suspended, but State legislation prescribing a militia organization different from that prescribed by the Secretary of War in the exercise of the power conferred upon him by Congress must also yield and stand suspended unless in either or both cases, the Secretary of War, in the exercise of the discretion vested in him by Section 3 of the Act of January 21, 1903, as amended, sees fit to make general exceptions which would serve to authorize the existence of exceptional organizations provided for by State legislation.

It may perhaps be urged that the conclusion thus arrived at serves to make an act of a State legislature subordinate to a regulation laid down by the Secretary of War. This however, is not the true view. It is not the regulation of the Secretary of War, but the operation of a constitutional statute enacted by the Congress of the United States, that serves to suspend the operation of State legislation not in harmony with the Federal statute.

Bearing in mind that, under the terms of Circular 8, the organization of brigades and divisions

within a State is optional with the State, subject only to the rule that if such organizations be formed they must conform to the rule laid down in the circular (see paragraph 6), it follows, from what has been said above, that it is by no means impossible for the State to comply with that part of Circular 8 which relates to the organization of brigades and divisions. If a State does not have the proper subordinate units to constitute a brigade or division, as the case may be, no such organizations need be formed. Should State legislation assume to authorize or require the formation of brigades or divisions not in conformity with the Federal rule, that legislation, as has been shown, must yield and stand suspended to the extent that it is in conflict with the Federal rule, and such State legislation is, therefore, not binding upon the State authorities. The latter would, therefore, be warranted in mustering out a major general and his staff if the State be without the necessary subordinate units to constitute a legal division under the Federal rule. The same is true of a brigadier general and his staff in case the State be without the necessary subordinate units to constitute a legal brigade under the Federal rule. Not a line of State legislation will be necessary to enable the proper State authorities to comply with the provisions of Circular 8 in respect to brigade and division organizations. It is true that if a state should desire to maintain a division, and the

State legislation does not authorize a sufficient number of subordinate organizations to constitute a division, then before the latter may be lawfully maintained as organized militia, State legislation would be necessary; but if the unauthorized divisional organization be abandoned in the meantime and the troops actually in service organized into brigades or inferior units in conformity with the provisions of Circular 8, no interference with any lawful and effective State organization will result.

Since January 21, 1910, the law, as it now stands, has required absolute conformity of militia organization to that prescribed for the Regular Army, subject only to such general exceptions as the Secretary of War may see fit to authorize, and to the specific statutory exceptions in favor of inspectors of small-arms practice and in favor of certain ancient militia organizations. Unless then, the Secretary of War sees fit affirmatively to exercise the discretionary power vested in him by statute to authorize general exceptions, the Federal statute itself requires conformity on the part of the militia to the organization prescribed for the Regular Army. The extent of the exceptions to be authorized rests in the sound discretion of the Secretary of War; and his decision not to grant a particular exception can not be construed as being in any wise a departure for the intent and spirit of the law. Neither can it be said that the fact

that in paragraphs 227 and 228, Militia Regulations of March 12, 1910, the Secretary of War authorized an exceptional brigade and division organization, and that the authority for such exceptional organization is now withdrawn, is foreign to the spirit and intent of the law. The extensive exceptions authorized in 1910 were no doubt induced by a desire on the part of the Secretary of War not to press for absolute conformity too soon after the law providing for such conformity became effective. The brigade and division organization prescribed for the Regular Army in paragraphs 5, 6, and 7 of the Field Service Regulations of February 21, 1910, has remained unchanged since the date. See paragraphs 5, 6, and 7 of the Field Service Regulations of May 21, 1913.

The question raised turns absolutely upon the definition of the word "organization". The word "organization" as used in the constitution of the United States is used as a technical military term, referring to a military matter. For this reason, in order to determine exactly what organization means in this connection, it would be more appropriate to refer to military authorities than to legal citations, as for instance, the word "distance" is frequently used in ordinary speech and is a familiar military term. As a military term, however, it means a particular thing; space in the direction of depth. Then, following the subject further, we find that "depth" in ordinary conversa-

tion and as a military phrase means entirely different things.

There is no such wide divergence, however, in the definition of the word "organization" as same is generally used, and as a purely military term.

In 21 Amer. and English Encyclopedia of law, 2nd Ed. "organization" is defined as being furnished with its necessary organs and qualified for the exercise of its appropriate functions.

Organization is also defined in a similar manner in 49 Kans. 112; 150 Pa. St. 70; 38 Conn. 66; 115 Mo. 577 and 53 Kans. 197.

It will be noted that in the cases cited, organization was usually defined with special reference to municipal or private corporations. The American Digest Century Edition, under the title "Militia", devotes a sub-section in Vol. 34, page 2844 to the subject of establishment and organization in general, and by extracts contained therein, particularly, 25 Me. 157 and 11 Mass. 386, and in the Decennial Edition, Vol. 13, page 1532, it appears that so far as the courts have ever construed the word "organization" in its military sense, it has been construed as having special and particular reference to the formation of tactical bodies of troops and the number and arm of units comprised therein.

We contend, however, that the true definition, and the one to be followed of organization, is that which is contained in the field service organization

of the United States Army upon the subject of organization, and is found in that volume, paragraphs 1 to 35 inclusive, rather than indulge in extensive comparisons and quotations, we might briefly say, and we do not believe that it will be denied, that the organization there prescribed is the same as Circular No. 8 with the exceptions noted in the circular.

We contend that the proper definition of organization includes, among other things, the fixing of the number and rank of officers and soldiers in each unit of an army, the number and arm of each of such units in the higher units, and the number and proportion of troops of the several arms of the service, which when contemplated together, constitute brigades, divisions and field armies. We contend that there are many other things which are fairly included in the definition of "organization"; but that Circular No. 8 in dealing with this subject confined itself to the fundamental and primary functions of organization.

The circular in question was issued under authority of the Act of Congress approved January 21, 1913 (32 Stat. 775) "to promote the efficiency of the militia", and known as the "Dick Bill", as amended by the Acts of May 27, 1908 (35 Stat. 399), and April 21, 1910, (36 Stat. 329), section 3 of which provides, *inter alia;* that, "on and after January 21, 1910, the organization, armament, and discipline of the organized militia in the several States

and Territories and the District of Columbia, *shall be the same as that which is now or may hereafter be prescribed* for the Regular Army of the United States, subject to time of peace to such general exceptions as may be authorized by the Secretary of War."

Section 1114, Revised Statutes, and the Act of February 21, 1901, prescribe the tactical organizations for the Army, and Section 1114, Revised Statutes, authorizes the commanding general to vary this disposition as to brigades and divisions whenever he may deem proper to do so. By these statutes and under this authority tactical organizations for the Regular Army are prescribed; and the purpose of the circular is to make the organizations of the militia conform more nearly thereto.

The bill of complainants proceeds on the theory that the attempt made by the circular to fix the organizations for the militia, as well as the legislation under which the circular was issued, exceeds the authority of the United States over the militia, as conferred by the Constitution of the United States; and that the order issued by the Adjutant General of the State for the purpose of making the militia of the State conform to the requirements of defendants "from putting into effect that portion of circular No. 8 which provides in detail the number and arm of units of troops which shall constitute brigades, regiments, and divisions of the

militia, and the commissioned and enlisted personnel thereof," etc.

The organization of the Regular Army, as prescribed under authority of Section 1114, Revised Statutes, is given in the Field Service Regulations; and Section 3 of the "Dick Bill" requires that the organization of the militia shall conform to the organization "which now or may hereafter be prescribed for the Regular Army"; and the circular in question was issued to make the militia conform more nearly to the organization prescribed for the Regular Army by narrowing the field of exceptions thereto and making them general under authority conferred by the words "subject to such general exceptions as may be authorized by the Secretary of War." So far as the Secretary of War and the Chief of the Division of Militia Affairs are concerned, their action amounts simply to giving effect to the purpose of the Act of Congress by withholding the exercise of the discretionary authority conferred on the Secretary of War to make exceptions to the organization, except as to such general exceptons as could be made without affecting the purpose of the statute.

The constitutional provision is found in Article I, section 8, clause 16, as follows:

> Congress shall have power to provide for *organizing,* arming, and disciplining the

> militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

The power is requisite to the common defense, and any organization which in the discretion of Congress is adapted to the need and tends directly to that end is constitutional. *Tarble's Case*, 13 Wall. 397; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 413. Even though not exclusive, still when once congress has carried its power into effect its laws for the organization, arming, and disciplining the militia are the supreme law of the land; and all interfering State regulations must necessarily be suspended in their operation. *Houston* v. *Moore*, 5 Wheat. 1; *Opinion of the Justices*, 14 Gray (Mass.) 614, 616. Any limitation upon Congress in this respect must be found in the grant itself, and not in any reserved power of the State.

The language of the grant is too clear to admit of questioning or limitation upon its meaning.

To "organize," in the common sense, means to bring all the parts into effective and systematic correlation and cooperation. An army consists of men of various groups, grades, rank, and functions. Militarily, then, organization includes arranging the groups or units of organization and prescribing

the number, grade and functions of the officers and men composing the organization. Of course, this power necessarily includes the selection of those thus to be organized. That such was the meaning attributed to the word by the framers of the Constitution is apparent from the report of the special committee which drafted the clause, Mr. Rufus King, for the committee, saying:

> By *organizing* the committee means proportioning the officers and men * * *. (*Elliott's Debates*, vol. v, p. 45.)

The power looked to the organization of the militia into divisions, regiments, and the like; the Federal Government prescribed the personnel of officers and enlisted men and the State appoints the officers thus required. *Tucker's Constitution*, pp. 583, 584.

From the earliest times the word, as applied to the personnel of the military establishment, or any part thereof, has been used by Congress and military men to prescribe the number and grade of commissioned officers and enlisted men of which the arm, branch, corps, department, or tactical unit is to consist. 1 Stat, 222, 241, 366, 430, 483, 552, 558, 569, 604, 725, 749; 2 Stat. 132, 481, 676, 710, 769, *791, 794;* 3 Stat. 96, *113,* 134, 297, 615; 4 Stat. 173; 5 Stat. *256,* 512; 9 Stat. 12, 13, 20, 184; act of July 22, 1861, 12 Stat. 268; act of August 3, 1861, 12 Stat. 287; 12 Stat. 378. Chapter 1, Title XIV,

The Army, Revised Statutes, is headed "Organization," and is devoted to prescribing in detail the composition of the Army and its units. The volunteer act of April 22, 1898 (30 Stat. 361), uses the word "organize" in the same sense, and the same is true of the Army reorganization act of 1901 (31 Stat. 738). The first militia act employed the word with the same significance (act of May 8, 1792, 1 Stat. 271). That act, after prescribing what citizens should compose the militia, made minute provision for its organization in sections 3 to 11, the first named section being as follows:

> That within one year after the passing of this act, the militia of the respective States shall be arranged into divisions, brigades, regiments, battalions and companies as the legislature of each State shall direct; and each division, brigade and regiment shall be numbered at the formation thereof; and a record made of such numbers in the adjutant general's office in the State; and when in the field or in service in the State, each division, brigade, and regiment shall, respectively, take rank according to their numbers, reckoning the first or lowest number highest in rank. That, if the same be convenient, each brigade shall consist of four regiments; each regiment of two battalions; each battalion of five companies; each company of sixty-four privates. That the said militia shall be officered by the respective States as follows: To each division one major general and two

> aides-de-camp, with the rank of major; to each brigade one brigadier general, with one brigade inspector to serve also as brigade major, with the rank of a major; to each regiment one lieutenant colonel commandant; and to each battalion one major; to each company one captain, one lieutenant, one ensign, four sergeants, four corporals, one drummer, and one fifer or bugler. That there shall be a regimental staff, to consist of one adjutant and one quartermaster, to rank as lieutenant; one paymaster; one surgeon and one surgeon's mate; one sergeant major; one drum major, and one fife major.

And the word was so employed in all subsequent militia legislation. 2 Stat. 769; 3 Stat. 134; 2 Stat. 215.

This meaning has been recognized by the courts as the correct one. *Houston* v. *Moore*, 5 Wheat. 1; *Opinion of the Justices*, 14 Gray (Mass.) 614, 616; *Commonwealth* v. *Thaxter*, 11 Mass. 386; *Commonwealth* v. *Allen*, 16 Mass. 523; *In re Adams*, 4 Pick. (Mass.) 25; *State* v. *Hopkins*, Dud. (S. C.) 101. In *Houston* v. *Moore*, *supra*, this court had occasion to discuss generally, but none the less carefully, upon a question that placed before the court the militia act of 1792, in connection with the act of April 18, 1914, the character and extent of this power. The court regarded the power as plenary, and certainly did not regard it as being limited in any such sense as here contended. Indeed, Mr. Jus-

tice Story would seem to have regarded the power to organize as so broad as to include the appointment of the officers had it not been limited by the express reservation to the States of the power of appointment, for he said:

> That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia"; and is a limitation upon the authority which would otherwise have developed upon it as to the appointment of officers.

In *Opinion of the Justices, supra*, the Supreme Court of Massachusetts, with reference to the power conferred upon the Federal Government, said:

> The establishment of a militia was manifestly intended to be effected by arranging the able-bodied men in each and all the States in military array, arming and placing them under suitable officers. * * * Organizing obviously includes the power of determining who shall compose the body known as the militia. * * * This power was early carried into execution by the act of Congress of May, 1792, being "An act more effectually to provide for the national defense by establishing an uniform militia throughout the United States."

The other cases cited recognize the plenary power of Congress to select the portion of the general militia to be organized and to organize them in such manner as it deems best.

Indeed, it is difficult to conceive what would be left in the word if this meaning were denied it.

This provision of the militia law falls well within the power of Congress to enact.

History and experience prove that the Regular Army standard of organization provided for is the one efficient means to a great end. Uniformity of organization is a military essential. In our system, unless the militia organization and training conform to the Army, there can never be the unity of effort and cooperation necessary to successful national defense. The old militia failed in several respects — the attempt to organize the general militia instead of a selected portion of it; and leaving the organization to the control of the States, instead of the Federal Government. Aside from all else, lack of uniformity among the State themselves and of conformity to Army standards was sufficient to condemn it. The one great object of the present law, as was said in the report of the House Committee, was to provide an organization for the Organized Militia "conforming to the present *composition* of similar troops in the Army and change in the future as Congress may see fit from time to time to make changes in the composition of the corresponding organizations in the Regular

Army." The object in requiring this conformity was, as expressed in said report, first, in time of peace to secure uniformity of instruction, and, second, in time of war to avoid confusion. House Reports, vol. v, 57th Congress, 1st session. The committee regarded uniformity of organization as the very essence of the new bill, and expressed the view that any variation or qualification which would open the door to a perpetuity of the lack of uniformity then prevailing would be most injurious to the service.

The report of the Senate committee, Senate Reports, vol. 1, 57th Congress, 2d session, adopts and approves the House report. In the debates it is clearly shown that the fundamental idea was to secure uniformity of organization. Cong. Rec., vol. 36, part 1, pp. 125 *et seq.*; pp. 299, 302, 353, 395, 492; Cong. Rec., vol. 35, part 8, 57th Congress, 1st session, pp. 7706, 7720, 7721.

Appreciating the defects of the militia law which had resulted in a total absence of military system, Congress at last heeded the recommendations of the Presidents from Washington down, repealed the obsolete law and submitted one of practical value. The one substituted provided that the training and equipment of the militia shall be along Army lines.

> On and after January 21, 1910, the *organization*, armament and discipline of the organized militia in the several States and Ter-

ritories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War: *Provided*, That in peace and war each organized division of militia may have one inspector of small-arms practice with the rank of lieutenant colonel; each organized brigade of militia one inspector of small-arms practice with the rank of major; each regiment of infantry or cavalry of organized militia one assistant inspector of small-arms practice with the rank of captain, and each separate or unassigned battalion of infantry or engineers or squadron of cavalry of organized militia one assistant inspector of small-arms practice with the rank of first lieutenant: *Provided, also*, That the President of the United States in time of peace may, by order, fix the minimum number of enlisted men in each company, troop, battery, signal corps engineer corps and hospital corps: *And provided further*, That any corps of artillery, cavalry, and infantry existing in any of the States at the passage of the Act of May 8, 1792, which, by the laws, customs or usages of the said States, have been in continuous existence since the passage of said Act under its provisions and under the provisions of section 232 and sections 1625 and 1660, both inclusive, of Title 16 of the Revised Statutes of the United States, re-

> lating to the militia, shall be allowed to retain their accustomed privileges, subject, nevertheless, to all other duties required by law in like manner as other militia.

There was no exercise of a greater or different power in enacting the law of 1903 than that of 1792.

The Secretary of War, in issuing Circular 8, did not exceed his authority under the law which prescribes the maintenance in the militia of the Army standard of organization, subject to modification only by his general exceptions.

The militia law requires that the militia personnel shall be destributed into tactical units and staff corps and departments, as is the personnel of the Regular Army, subject to modifications authorized by the Secretary of War. As was said by the Supreme Court of Florida, with reference to this section (3) of the militia law, in *Acker* v. *Bell*, 57 So. 356, 358 —

> Organization relates to the distribution of the personnel of the Army or militia, both commissioned and enlisted, into units. It provides for the distribution of the personnel into different arms and corps, such as infantry, cavalry, artillery, staff corps, medical corps, signal corps, etc., and the distribution of the personnel in each arm of the service corps into different units, such as divisions, brigades, companies, platoons, sec-

> tions, squads, etc., and, further, into different ranks or grades, such as generals, colonels, lieutenant colonels, majors, captains, lieutenants, sergeants, corporals, privates, etc. * * *; it is essential to the effectiveness and efficiency of the forces called into the national service that the organization thereof should be the same—one harmonious whole.

This harmony is obtained by requiring conformity to Army standards of organization. Those standards are prescribed in the Army reorganization act of February 2, 1901 (31 Stat. 748), and subsequent acts making minor modifications, and in section 1114, Revised Statutes. The former act fixes the organization of the several staff corps and departments and the tactical organizations up to and including the regiment; section 1114 prescribes the minimum organization of brigades and divisions leaving the further organization of these units to the discretion of the Secretary of War who now, since the organization of the General Staff, exercises the functions of the commanding general. In 1910, the Secretary of War prescribed the organization of tactical brigades and divisions in the Regular Army. Circular 8 requires the organization of militia divisions and brigades to be the same, with liberal modifications, as those prescribed for the Regular Army, and that all other units and staff corps should, with like modifica-

tions, be organized as prescribed by the said Army reorganization act as slightly modified by subsequent legislation.

Circular 8 announces the general exceptions which the Secretary of War is authorized to make and must make if the militia organization is to vary at all from the corresponding organizations of the Regular Army. That Congress has the power to confer that authority on the Secretary of War is not questioned. He has required nothing more, but much less, than the operation of the statute would require without the Secretary's interposition.

The theory of the bill, is that the statute under which the circular was issued is illegal in that the United States is without power to prescribe the organizaiton of the militia, and that the acts of the defendants in enforcing the Army organization on the militia are, therefore, without authority of law, and invade the rights of the complainant. The law with respect to threatened illegal acts to the injury of the rights of the complainant is stated in Philadelphia Co. *v.* Stimson (223 U. S. 620) as follows:

> "And in case of an injury threatened by his illegal action, an officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to State officers seeking to enforce unconstitutional enactments * * * (a

> number of authorities being here cited), and it is clearly applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred * * * *."

We submit that in a close question with respect to legality of a military order, that any doubt there might be should be resolved in favor of the legality of the order for this reason: While we freely concede that if a military order be clearly illegal, the person to whom it is addressed, may, after having complied with it, raise the question of its illegality or, as in the present instance, by the special permission of his superiors, may raise the question in the courts, and while we also concede that the military power is subordinate to the civil under our system of government, yet the civil courts have uniformly refrained, except in cases where the usurpation of power or the illegality of the act was unquestioned in interfering. In military service, the first word is discipline, and there is no second. If orders issued by an officer of the military establishment were set aside or modified by the courts upon any trivial reason, it would cause timidity in the military commander with respect to the issuing of such orders, and uncertainty in the minds of those to whom the orders were addressed, as to whether the orders might be ultimately sustained and their individual responsibility in carrying them out. When it is also considered that by the

articles of war the disobedience of an order may be punishable by death, it becomes a question of great importance to all officers that if there be a discretion, however slight, vested in the officer promulgating the order, that the order should be upheld. Military training is highly technical. The science of war is an imperfect science. The judgment of a court should never be substituted for the judgment of an officer, where the officer has a right to exercise that judgment. If his duty be absolutely ministerial only, then we concede that the courts may order by mandamus, or restrain by injunction in a proper case. But we submit that in the present case by the Federal statute, discretion was vested in the Secretary of War. We think wisely and rightfully so, that whether wisely or unwisely, the matters with respect to which the legislature was passed and the order issued thereunder, came within the constitutional power of courts to provide for the organization, armament and discipline of the militia, then it was the exercise of a discretionary power under lawful authority, which may never be interfered with.

We come now to the final subject of consideration; whether or not the National Guard or Militia may be used as such in foreign war, beyond the limits of the United States. It is claimed by our opponents that the use to which the Militia may be put is limited to domestic disorders, the suppressing of insurrection and the repelling of invasion.

and it is sought by them to so strictly construe this constitutional provision, that the Militia may not be used beyond the territorial limits of the United States. It is ample time that the question was passed upon by the court, as this contention has been the cause of some of the darkest days in our military history.

In 1812 the United States suffered national humiliation through the refusal of the Militia to cross the river at Detroit into Canada.

> Upton, Military Policy of the U. S. pg. 99, Document No. 494, 62 Congress, 2nd Session,

and again, in the same war, a detachment of the Militia refused to cross the Niagara River, and permitted troops of the Army to be destroyed and defeated across the river on the other side.

> ibid pg. 100;
> Van Rensselaer, affair of Queenstown, pg. 27.
> James Military Occurrences between Great Britain, and the U. S. Vol. 1, pg. 97.

It is therefore of the highest importance that this question be definitely settled and settled correctly.

By our constitution and the laws enacted thereunder, the Militia of the United States is com-

posed of all able bodied male citizens between the ages of 18 and 45, with the possible exception of the troops actually serving in the regular army. Nor is this exception certain. It might well be held that under the strict interpretation of the law a soldier of the regular army is also included within the general term of militia.

At the time of the formation of the constitution, there was no regular army, and the Militia as then formed was intended to include all persons capable of bearing arms. We contend therefore, that the provision of the constitution placing those important duties upon the Militia to control domestic disorders and insurrection and repelling invasions, were declaratory only of the fundamental and highly important duties of the Militia and by Militia, meaning all persons capable of bearing arms, and did in no wise limit their obligations and duties to the ones enumerated.

The highest duty that a nation owes to itself, is that of self-preservation. Its right to use the property, and if necessary, the lives of its citizens in self-preservation, is its highest right and duty and this right and duty should be read into all of our constitutional provisions. *Military service is a moral duty of every citizen.*

Janet, Elements of Morals, pg. 153.

It arises from the right of self-preservation and

self-defense, which is national as well as individual.

> Marion, Droits et devoirs de L'homme, pg. 67; Porter Moral Science 498.

We contend that neither by legislative enactment, nor in any other manner may the power of the Nation to protect and preserve its own integrity, be limited. These questions have arisen repeatedly in the United States in questions relating to the power of Congress to raise armies by drafts and conscripts.

The power of Congress to raise armies is plenary and exclusive (Tarbel's Case, 13 Wall 397; Jacobson v. Massachusetts 197 U. S. 11; and the cases hereinafter cited and discussed.) That the power may be exercised by forced draft has not since the Civil War been open to question, for it was so determined in cases arising under the Federal and Confederate conscript laws of that period. The draft acts of the Federal Government were tested in the courts and sustained in the following leading cases:

> McCall's Case 5 Phila. 268 (1863); Kneedler v. Lane, 45 Pa. St. 38 (1863).

The constitutionality of the conscript Acts of the Confederate Government was much more vigorously contested, and was, without exception, sus-

tained with corresponding firmness by the courts of last resort of all the states of that government before which the question came, in opinions justly celebrated for having set at rest this constitutional question. The following well considered opinions upon the various conscript Acts of the Confederate States Government — whose constitution as regards this power was the same as ours — leave nothing to be questioned:

Ex parte Coupland, 26 Texas Reports 388;
Ex parte Tate, 39 Alabama Reports 254;
Fitzgerald v. Harris, 33 (Supplement Georgia), 54;
Jones v. Warren, 34 Georgia, 28;
Jeffers v. Fair, 33 Georgia 347;
Burroughs v. Peyton, 16 Grafton (Virginia), 470.

The cases just cited sustain the following propositions:

(a) If there were no express grant "to raise and support armies," the right of the general government could be sustained as a power inherent in national sovereignty.

(b) The power "to raise and support armies" is an express constitutional grant to the general government; and there is no limitation as to the mode or manner of exercising it, by any other express provision, or by any necessary implication.

(c) The Conscript laws do not violate any of the abstract or guaranteed rights of the citizen, nor assume over him any control not delegated by the Constitution.

(d) The grant of the power to make war and to raise armies carries with it by necessary implication, unless expressly withheld, the right to demand compulsory military service from the citizen; this express power, together with the implied power, is vested in the Congress of the national government.

(e) The general government is not dependent upon the will either of the citizen or of the State, to carry into effect the power to raise and support armies.

Congress, then, has a general and plenary power to raise armies by draft, or compulsion; and, at the outset, it will be informing to examine into the question, whether a member of the Organized Militia is subject to the power of Congress in this regard like any other citizen, irrespective of his militia status. Legislative and judicial precedents show conclusively that his status in the militia affords him no constitutional exemption. Drafts of *State* troops were resorted to during the Revolutionary war (2 Jour. Cong. 458-9; 3 idem 68), and the Act of June 30, 1834, refers to "drafted militia" as in the service against Indiana on our frontier. But the first instance is that contained in provisions of the Act of March 3, 1863 (12 Stat.

731), which was necessitated by the fact that owing to, defects in the operation of the existing militia systems of the United States, the calling forth of the militia under the Constitution and the Act of July 17, 1862, had proved quite inadequate to the emergencies of the period. The Conscript Act of 1863 *supra,* proved to be an effective measure, rendering liable to draft all able-bodied citizens of the United States and all aliens who had declared their intention to become citizens, between twenty-one and forty-five years of age, but while the act provided for the acceptance of substitutes and for pecuniary commutation in lieu of service, it is a remarkable fact that the governors of the several states were the only officers of the state governments excepted from the provisions of the Act and rendered exempt from liability to the Federal draft.

The present militia law defines the militia to consist of every ablebodied citizen of the several States, Territories, and the District of Columbia; and every male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age; it divides the militia into the classes — the organized Militia consisting of the regularly enlisted, organized and uniform active militia of the several states, etc., participating in the annual appropriations made by Congress; and the Reserve Militia consisting of the remainder. The "Militia," in

the general and constitutional sense, consists of the entire arms-bearing population of the several states, and it may be presumed that Congress, in the present militia law, has placed its own definition upon what is meant by the arms-bearing population, in defining the militia of the several states. The only source from which armies may be raised to the arms-bearing population of the United States, the only source from which the Militia may be organized is the arms-bearing population of the several states; these sources are one and the same. The unlimited power to carry on war and to raise armies is granted to the United States and denied generally to the states; as a common sense proposition it cannot be supposed that the enrollment and enlistment of a citizen in the Organized Militia of a state takes him, in and of itself, out of that source from which United States armies must be raised even if he be not already a member thereof. Though an organized militia man of the state, he still remains a citizen of the United States, and subject as such to the supreme power of the general government to draft him in the armies even if that be not his status as a National Guardsman. Such a proposition accords with the well established theories that in the exercise of the war power the Union operates upon the individual citizen directly and not upon the states, nor upon the individual through the medium of the states; and that it is the effect of the constitution to render

the Federal Government supreme in all that pertains to war; it also accords with the theory that the power, exercised by the states under the Confederation, of drafting their militia in response to a requisition made upon them by Congress for regular soldiers, was conferred by them on the General Government. So too, the Conscript Acts of the Confederate States Government, and the Draft act of the United States, during the Civil War, evidently proceeded upon the proposition that enrollment in the militia or enlistment therein could not operate to place the citizen beyond the reach of the Federal power, as these acts made no exemption of enrolled and organized militia. And to the same effect are the judicial decisions.

None of the cases cited and quoted, *supra,* holding that Congress has the power to resort to draft, has excluded from the application of that power any of the Organized Militia; all of them, on the other hand, have affirmed the contrary view, in a general way, by the use of broad and emphatic language to that effect; while some of them, especially those decided by the courts of the Confederate States, where the point was specifically raised, have pointedly declared that the Organized Militia, as individuals, are subject to the compulsory power of congress to raise armies. For instance, in *Ex parte Tate,* supra, the Supreme Court of Alabama said:

> "Until he (the citizen) ceases to be a citizen with the rights and duties which pertain to a citizen, he cannot exonerate himself or be excluded by the legislative power from the obligations which inherently attach to that relation. Protection is his right and allegiance his duty, so long as he remains a citizen; and the highest duty of allegiance is to respond to the call of the country for soldiers when her liberty, including his own, is threatened and her existence endangered by an invading enemy."

In *Fitzgerald* v. *Harris, supra,* the Supreme Court of Georgia, after holding that Congress could not grant irrepealable exemption from draft, used the following significant language:

> "Even in war, when it becomes necessary to send into the field a larger proportion of the population, it is greatly desirable that another portion be left at home. There are always men who can be more useful at home than others, and more useful there than in the field. As, in the raising of armies, the course has not been to take the whole population, or even the whole of a class (where resort is had to classification), in the exercise of sound discretion, exemptions may be granted as incidental to the general power, but they must be removable at the will of Congress.
>
> "*No man or set of men can be placed*

without the pale of legislative control in this matter for a single day."

In *Burroughs* v. *Peyton, supra,* the Court of Appeals of Virginia said:

> "It is true that the Constitution does recognize the Militia, and provides for using it, as well as the regular army, in the military service of the country. Well regulated militia has (as it is stated in one of the amendments) always been regarded as necessary to the security of a free state. It was therefore proper that provision should be made in the Constitution for the organization, and for that authority to be exercised over it by the State government and Congress respectively. It was not probable that, in the exercise of the power to raise armies, Congress would, under ordinary circumstances, materially diminish the number of the militia. But it cannot be true that, with a view to preserving the militia entire, it was intended to deny to Congress the right to take individuals belonging to it into the regular army. This construction would prevent Congress from obtaining from its ranks not only conscripts but volunteers also; but as the militia embraces the whole arms-bearing population, it would render it necessary that the army should contain nothing but foreigners enlisted for the purpose, and having no interest in common with the people of the coun-

try, nor can we imagine that such was the intention of the framers of the Constitution.

"The true interpretation of the Constitution with reference to this matter would seem to be, that the power to *use the whole military force of the country* was conferred upon Congress, and it was left to their discretion to fix, as the varying interests of the country may require, the relative proportion of regular troops and militia to be employed in the service.

It will be noted that the Court in this case expressed the view that the action of the Federal Government was upon the individual and not upon the militia as an organized body, which in a general sense is true; but later on in this discussion, it will be shown that the court explained and modified its language to such an extent that this opinion may in fairness be quoted as authority for the proposition that the government may also take the militia as organized bodies. The Court in this case forgot however, that there was no regular army at the time of the framing of the constitution nor for long after. The reasoning however, is good.

In *Ex parte Coupland, supra,* the Supreme Court of Texas, in answering the argument that the organized militia was not subject to draft into the armies of the general government, but could only be called forth *as militia* and as provided by the constitution, said:

"The fallacy of the position seems to be manifest from the qualifications which they are forced to give it. For, as we have shown, the citizen has no right to exercise volition, with regard to preference of military duty, so as to impair or qualify the power of Congress to raise armies, and if the qualifications exist by reason of the rights of the state over the arms-bearing citizens as to militia, and then appoint their officers when in the service of the Confederate states, these rights cannot be effected by the voluntary action of the citizen. Nor can the difficulty be gotten over by saying that it is further to be assumed that the state must be presumed to have consented to his voluntary enlistment; for it is impotent as the citizen to destroy in this manner a constitutional right conferred upon Congress or thus to confer one not otherwise given * * * The individual is equally an arms-bearing citizen whether he goes into the service voluntarily or otherwise. For surely the doctrine is not to be advanced that individuals, companies, or regiments of the 'well regulated' arms-bearing citizens 'accessory to the security of a free state' which has been organized, armed, and disciplined as provided for by Congress and for whom a call is made by the Confederate States, in pursuance of the Constitution, cease to be integral parts of the arms-bearing citizens of the state, because they preferred to volunteer their

services directly to the Confederate Government, and it is willing to accept them. It is said, however, that * * * the control of the State over its militia may be entirely destroyed, but would not the result be the same if an equal number of its militia were to volunteer into the service of the Confederate States? The truth of the matter is, that when the citizen goes into the army raised by Congress, either voluntarily or in obedience to law requiring him to do so, he does this as a citizen and not as a militiaman. Congress has not the right to raise armies in either way beyond the necessities of the government for carrying into effect its granted power, but in either case the citizen when placed in its service is temporarily withdrawn from the control of the State as a militiaman, and for the time being the right of the State, or more properly speaking, the right of the State government over him must yield to the more pressing and important demand for his services by the Federal government to enable it to discharge the duties for which it has been authorized to raise and support armies."

It cannot but be admitted that the reserve militiaman is subject to draft and if so to foreign service. If the organized militiaman is not, it will aid to clarify the situation by asking, why not? and seeking the possible objections to such a

as citizens and then establish among them the corresponding officers and relations previously existing in their organizations. And if the United States does so, or undertaking to do so fails in its effort because it does not exert the full power, that is a matter of federal and not of State's concern.

There is another consideration in point here; under the constitution congress has the power "to provide for organizing, arming, and disciplining the militia"; and even if this power is not exclusive, nevertheless — "when once conquered has carried its power in to affect, it laws for the organization, arming and disciplining of the militia, are the supreme law of the land; and all interfering State regulation must necessarily be suspended in their operation."—

Houston vs. Moore, 5 Wheat. 51.

Now, there is reserved to the States the right to appoint the officers of the militia, at most, the implied power to provide for the organization of the militia when the United States has not done so, regards matters not covered by federal regulation: and no more. Not only may Congress determine who shall and who may not compose the militia, but having done so, the State government has no legal authority to prescibe otherwise (14 Gray Mass. 619). Congress may also determine

what part of the militia shall be organized, and may apportion the officers and men. It may determine what military officers there may be, although having so determined it is the right of the States, expressly reserved, to appoint the officers. Organization rests within the exclusive power of Congress if it chooses to exert the power; although the State has the reserved power to appoint the officers, it may not create the office nor define its place in the military hierarchy, nor its relation to the organization, if Congress should choose to legislate to that effect.

We submit therefore, that if the militia may not be used in foreign service and outside the boundaries of the United States, then it of necessity follows that no troops may be so used. And we submit that it is against the spirit of the constitution and of that higher law of national self-preservation which is superior to the constitution, and for the attainment of which the constitution itself was formed, to contend that the militia or any other soldiers or citizens of the United States may not be used either in domestic or in foreign service whenever national honor may require it.

Respectfully submitted,

HUBERT J. TURNEY,

NATHAN WILLIAM MCCHESNEY,

DON R. SIPE,

Attorneys for Respondent and Appellee.